A

TAN WEI MIA & ORS v. PENTADBIR TANAH DAERAH GOMBAK

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[LAND REFERENCE NO: RS-15-85-95]
B 20 DECEMBER 2023

Abstract – *Pursuant to the Land Acquisition Act 1960, the National Land Code and the Town and Country Planning Act 1976, the question of zoning is relevant to the determination of the market value of scheduled lands as at the date of the gazette notification. In this case, as there was no local plan published and/or gazetted by the local planning authority, there was thus no zoning of the area in which the scheduled lands were located as at the time of the acquisition in 1994. Accordingly, the scheduled lands were not deemed as building land with commercial status or commercial purposes as at the date of the gazette notification.*

LAND LAW: *Proceeding – Land reference proceeding – Rehearing – Adequate compensation – Classification of land – Land use – Whether scheduled lands zoned as commercial based at date of valuation – Whether actual and existing use of scheduled lands building for commercial purposes – Whether question of zoning relevant to determination of market value of scheduled lands as at date of gazette notification – Whether assessors shall refer only to documentary evidence filed by parties in rehearing of land reference proceeding and not previous rehearings or other sources – Land Acquisition Act 1960 – National Land Code – Town and Country Planning Act 1976*

CIVIL PROCEDURE: *Res judicata – Estoppel – Whether applicable – Land reference proceeding – Re-hearing – Whether principle of res judicata and estoppel applied to earlier decisions of High Court that scheduled lands zoned as commercial as at date of valuation and ought to be valued as 'commercial building' – Whether findings of High Court remain binding on parties – Whether parties estopped from relitigating issue of category of land use of scheduled lands*

This was a land reference proceeding under the Land Acquisition Act 1960 ('LAA') in respect of the compulsory acquisition of parts of lands owned by the deceased for the construction of the Middle Ring Road II ('MRR II'). This proceeding has had a long history of hearings and applications since the deceased's objection to the land administrator's award of compensation was referred to this court in 1995. The deceased was the registered owner of three plots of land, namely Lots 841, 843 and 847 ('scheduled lands'). The declaration of the intended acquisition of parts of the scheduled lands (Form D) was published in the Selangor State Gazette No 139 dated 17 February 1994 ('gazette notification'). The deceased passed away on

22 October 2005. The applicants were the executors and trustees of his estate. Seventeen years after the deceased's death, the applicants on 3 October 2022 applied to substitute themselves as parties in this land reference proceeding, which was allowed. The scheduled lands were alienated prior to the commencement of the National Land Code ('NLC'): Lots 841 and 843 were alienated on 28 June 1929; Lot 847 was alienated on 7 July 1930. They were freehold lands. There were no category of land use, express conditions or restrictions in interest stated on the grants of each land. The land administrator held an enquiry under the LAA on 31 March 1995. He valued the scheduled lands as agricultural lands and made awards of compensation. Dissatisfied with the amount of the land administrator's award, the deceased referred his objection to the High Court for its determination in this land reference. In brief, on 3 October 1997, a consent order between the deceased and the respondent was recorded by the late Faiza Tamby Chik J ('consent order'). However, on 19 January 2016, the Court of Appeal declared that the category of land use of Lots 841 and 843 were in fact 'building' before and since the commencement of the NLC. Following the Court of Appeal's declaration, the deceased filed an originating summons to set aside the consent order. On 31 March 2017, Azimah Omar J (as she then was) set aside the consent order and ordered that the land reference be reheard before a different High Court on the basis that the category of land use of the scheduled lands was 'building.' The Court of Appeal upheld Azimah Omar J's decision and ordered that this land reference proceeding be remitted for rehearing at the High Court. This land reference was reheard before Vazeer Alam Mydin Meera J (as he then was) and two assessors. On 3 May 2018, His Lordship ordered, *inter alia*, additional compensation in the sum of RM1,426,266.18 to be paid to the applicant ('Vazeer Alam J's decision'). Dissatisfied, the applicants appealed against the decision. On 20 March 2019, the Court of Appeal allowed the applicants' appeal against Vazeer Alam J's decision and remitted the land reference to the Shah Alam High Court for rehearing before a different judge. This land reference was reheard for the second time before Che Ruzima Ghazali J (as he then was) and two assessors. Che Ruzima Ghazali J delivered his decision as to the compensation to be paid to the applicants (the principal amount, which included the market value and injurious affection) ('Che Ruzima J's decision'). Dissatisfied with the said decision on the principal amount, the applicants appealed against the said decision. The Court of Appeal allowed the appeal against Che Mohd Ruzima J's decision and directed that this land reference be reheard before a different judge on the issues of market value, injurious affection, damages and rectification costs. After the Court of Appeal's latest order and prior to this third rehearing of the land reference proceeding, the applicants made applications to file a new valuer's report and rebuttal report, and to substitute the applicants as

parties to this land reference proceedings. Both applications were allowed respectively. The applicants subsequently filed the application for the questions of law ('QOLs') to be determined by this court, which application was the subject matter of this judgment. The QOLs, *inter alia*, were (i) whether the principle of issue estoppel and/or *res judicata* applied to the earlier decisions of the High Court given on 20 November 2019 and on 3 May 2018 that the scheduled lands were zoned as commercial as at the date of valuation and ought to be valued as 'commercial building' instead of 'residential building' and which finding was not specifically varied or reversed by the Court of Appeal ('question (i)') ; (ii) whether the scheduled lands ought to be valued on the basis that the scheduled lands were zoned as commercial based on the actual and existing land use of the scheduled lands as at the date of valuation of 17 February 1994 ('question (ii)'); (iii) whether the question of zoning was wholly irrelevant to the valuation of the market value of the scheduled lands as at the date of valuation of 17 February 1994 ('question (iii)'); and (iv) whether the court assessors, when determining their opinion on the amount of compensation to be given, shall refer only to the documentary evidence that had been filed by the parties in the present proceedings for the purposes of this rehearing, and not other evidence relating to the scheduled lands in earlier court proceedings or from other sources ('question (iv)').

Held (ordering accordingly):

(1) The law on issue estoppel and *res judicata* is long settled. Pursuant to the principle of *res judicata*, a question of fact or a question of law cannot be relitigated and adjudged by a court and the parties are estopped from relitigating the matter in a future suit or proceeding, where: (i) the question of fact or question of law had previously been litigated and decided by the court; and (ii) (a) no appeal had been taken to a higher court against the said decision of the court; or (b) an appeal had been taken to a higher court and the appeal was dismissed; or (c) no appeal lay against the decision of the court. The applicants in this land reference proceeding did appeal against both the decisions of Vazeer Alam J and Che Ruzima J. The Court of Appeal had allowed both appeals; it had set aside Vazeer Alam J's decision and ordered the land reference to be remitted for rehearing before a different judge at this court. It had also set aside Che Mohd Ruzima J's decision and ordered this land reference be remitted to the High Court of Shah Alam for rehearing on the issues of market value, injurious affection, damages and rectification costs. The applicants, having appealed against the whole of the decision of the High Court, and the Court of Appeal had allowed the appeals, could not now argue that the findings of the High Court as to the category of land use of the scheduled lands in both decisions remain binding on the parties. The Court of Appeal had set aside both decisions. Thus, the High

Court's decisions were no more and were, accordingly, no longer binding. The findings in both decisions, as to the category of land use, were also no more and no longer binding. Thus, the issue of the category of land use of the scheduled lands was not *res judicata*. The parties were, therefore, not estopped from relitigating the issue of the category of land use of the scheduled lands. Question (i) was answered in the negative. (paras 38-45)

(2) Under ss. 101 and 103 of the Evidence Act 1950, the burden of proof was on the applicants to prove on a balance of probabilities that the 'actual and existing use' of the scheduled lands on 17 February 1994 was building for a commercial purpose. Pursuant to s. 18 of the Town and Country Planning Act 1976 ('TPCA'), the use of any land or building must conform with the local plan, which is defined in s. 2. Majlis Perbandaran Ampang Jaya ('MPAJ') is the local planning authority empowered to determine the zoning for the area where the scheduled lands are located. The MPAJ confirmed that in 1994, there was no local plan area for the area and it did not publish and/or gazette any local plan, and it had not designated any zoning in the area where the scheduled lands are located or the lands in its vicinity. The structure plans did not exist as of the date of the gazette notification. The only structure plan available during the hearing, was published in 1998, which was four years after the acquisition of the scheduled lands. Accordingly, as no local plan was published and/or gazetted by the MPAJ, there was no zoning of the area in which the scheduled lands were located as at the time of the acquisition in 1994. Therefore, the scheduled lands were not deemed as building land with commercial status or commercial purposes as at the date of the gazette notification. (paras 48-59)

(3) The Malaysian Valuation Standards ('MVS') are standards prescribed by the Board of Valuers, Appraisers, Estate Agents and Property Managers Act ('the Board') under s. 10(hd) of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 (Act 242) ('VAEAPM Act') to carry out the provisions of Part III to Part VIII of the Act. The MVS are not rules made under VAEAPM Act and are accordingly not a subsidiary legislation. 'Highest and Best Use' is not one of the standards prescribed in the MVS, which are MVS1 to MVS 19. Instead, it is one of the general valuation concepts and principles that 'provides an overview of fundamentals that are particularly important to the understanding and application of the MVS'. As the concept of 'highest and best use' is not a rule made by the Minister under the VAEAPM Act or subsidiary legislation, the valuation concept of 'highest and best use' is not binding on this court in determining the value of the scheduled lands as at the date of acquisition. (paras 109-111)

(4) Evidence showed that there was no zoning, no local plan or structure plan for the area where the scheduled lands were located at the time of the acquisition. The MPAJ did not have any record or information on the zoning of the area in 1994. The applicants could not prove, on a balance of probabilities, that the actual and existing use of the scheduled lands as of the date of the gazette notification was building for commercial purposes. The applicants also did not produce any documents that Lots 841 and 843 were tenanted for commercial purposes in 1994. Based on the evidence, the scheduled lands ought not to be valued as lands that were zoned as commercial based on the actual and existing use of the lands as of 17 February 1994. Question (ii) was answered in the negative. (paras 114 & 115)

(5) Based on the provisions in the LAA, the NLC and the TCPA, and the decisions of the Federal Court in *MMC Tepat Teknik Sdn Bhd v. Pentadbir Tanah Daerah Klang & Anor And Other Appeals*, and *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor*, the question of zoning was relevant to the determination of the market value of the scheduled lands as at the date of acquisition of 17 February 1994. Question (iii) was answered in the negative. (para 117)

(6) When determining their opinion on the amount of compensation for the lands acquired, the court's assessors shall refer only to the documentary evidence that had been filed by the parties in this rehearing of the land reference proceeding and not in the previous rehearings of the proceeding or other sources. Question (iv) was answered in the affirmative. (para 118)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Government Of Malaysia v. Dato Chong Kok Lim [1973] CLJU 35; [1973] 1 LNS 35 HC ***(refd)***

Jais Chee & Ors v. Superintendent Of Lands & Surveys, Kuching Division, Kuching [2014] 3 CLJ 467 CA ***(refd)***

KCSB Konsortium Sdn Bhd v. Pentadbir Tanah Johor Bahru & Anor [2019] CLJU 790; [2019] 1 LNS 790 HC ***(refd)***

Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor [2015] 7 CLJ 27 CA ***(refd)***

Messrs K Sila Dass & Partners v. Tune Insurance Malaysia Bhd & Anor [2017] 10 CLJ 475 HC ***(refd)***

MMC Tepat Teknik Sdn Bhd v. Pentadbir Tanah Daerah Klang & Anor And Other Appeals [2023] 9 CLJ 1 FC ***(refd)***

PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***

Satyadhyan Ghosel & Ors v. Sint Deorahin Dobi & Anor AIR 1960 SC 941 ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Superintendent Of Land And Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman [2020] 2 CLJ 425 FC ***(refd)***
Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor (Civil Appeal No: B-01(A)-310-09-2015) (Unreported) ***(refd)***
Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor [2016] 7 CLJ 722 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 17(1), 18(1), 101, 103
Federal Constitution, art. 13(2)
Land Acquisition Act 1960, ss. 9A, 45(2)
National Land Code, s. 124
Rules of Court 2012, O. 33 rr. 1, 2
Town and Country Planning Act 1976, ss. 2, 18
Valuers, Appraisers, Estate Agents and Property Managers Act 1981, s. 10(hd)

For the applicants - Raymond Mah Mun Kitt, Denise Phang Hui Yan, Joseph Khor Sheng Yang & Rachel Ng Ker Chi; M/s Mah Weng Kwai
For the respondent - Khairul Nizam Abu Bakar, Siti Radziah Kamarudin, Nurul Izzah Abdul Mutalib, Mohd Shah Faris Kamarulzaman, Amelia Masran, Nur Syafinaz Hayati Kamaruddin & Chempaka Sari Kamarudin; State Legal Advisor, Selangor

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is a land reference proceeding under the Land Acquisition Act 1960 (Revised 1992) (Act 486) ("LAA 1960") in respect of the compulsory acquisition of parts of lands owned by the late Mr Tan Bok Yin @ Chin Hon Ying @ Tan Hon Ying ("the deceased") for the construction of the Middle Ring Road II ("MRR II"). This proceeding has had a long history of hearings and applications since the deceased's objection to the Land Administrator's award of compensation was first referred to this court in 1995.

[2] This judgment is in respect of the questions of law ("QOLs") referred by the applicants on 29 March 2023 for the determination of this court at this latest rehearing of the land reference proceeding.

[3] The deceased was the registered owner of three plots of land known as Lot 841 GRN 47697 ("Lot 841"), Lot 843 GRN 47969 ("Lot 843"), and Lot 847 GRN 32548 ("Lot 847"), all in the Mukim of Ulu Kelang, Daerah Gombak, Selangor (the "scheduled lands"). The declaration of the intended acquisition of parts of the scheduled lands (Form D) was published in the Selangor State Gazette No. 139 dated 17 February 1994 ("the gazette notification").

[4] The deceased had passed away on 22 October 2005. The applicants are the executors and trustees of his estate. Seventeen years after the deceased's death, the applicants on, 3 October 2022, applied to substitute themselves as parties in this land reference proceeding. After hearing the submissions of counsel for the applicants and the respondent, I allowed the application. The applicants were substituted as parties to this land reference proceedings pursuant to this court's order of 5 January 2023.

[5] The scheduled lands were alienated prior to the commencement of the National Land Code ("NLC"): Lot 841 and Lot 843 were alienated on 28 June 1929; Lot 847 was alienated on 7 July 1930. They are freehold lands. There are no category of land use, express conditions or restrictions in interest stated on the grants of each land. Details of the scheduled lands, the size of the lands acquired, and the remaining lands post-acquisition are as follows:

Lot	Lot 841	Lot 843	Lot 847
No. Hakmilik	Geran 10049	Geran 10051	Geran 32548
Mukim	Hulu Kelang		
Daerah	Gombak		
Luas Tanah	10,900 mp	11,000.00 mp	28,100.00 mp
Luas Diambil	1,214.17 mp	756.77 mp	10,752.25 mp
Luas Baki	9,685.83 mp	10,243.23 mp	17,347.75 mp
Pegangan	Selamanya		
Kategori Tanah	Tiada		
Syarat Nyata	Tiada		
Sekatan Kepentingan	Tiada		
Pemilik	Tan Bok Yin @ Chin Hong Yin (1/1 bahagian)		

[6] The Land Administrator held an enquiry under the LAA 1960 on 31 March 1995. He valued the scheduled lands as agricultural lands and made the following awards of compensation:

Lot	Category of Land Use	Rate	Land Administrator's Award	
841	Agricultural Land (with residential development potential)	RM215.26 smp	Land:	1,214.07 mp @ RM215.26 smp **= RM261,360.00**
			Building:	**RM57,000.00**
			Guard House	**RM2,500.00**
			Fencing	RM3,500.00
843	Agricultural Land	RM215.26 smp	Land:	756.77 mp @ RM215.26 mp **= RM162,920.00**
847	Agricultural Land	RM269.00 smp	Land:	10,752.25 mp @ RM269.00 smp = **RM2,892,355.00**
			Total :	**RM3,379.635.00**

[7] Dissatisfied with the amount of the Land Administrator's award, the deceased referred his objection to the High Court for its determination in this land reference.

This Rehearing Of The Land Reference Proceeding

[8] This current and latest rehearing of the land reference proceeding before me is the third rehearing ordered by the Court of Appeal: the first was pursuant to Court of Appeal order dated 25 September 2017; the second, pursuant to Court of Appeal order dated 20 March 2019; and the third, pursuant to Court of Appeal order dated 26 January 2021.

[9] In brief, on 3 October 1997, a consent order between the deceased and the respondent was recorded by the late Faiza bin Tamby Chik J (the "consent order"). However, nine years later – on 19 January 2016, the Court of Appeal in *Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor* Civil Appeal No. B-01(A)-310-09-2015 (Shah Alam High Court OS No. 24-754-06-2014) declared that the category of land use of Lots 841 and 843 were in fact "building" before and since the commencement of the NLC: see *Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor* [2016] 7 CLJ 722; [2016] 5 MLJ 43.

[10] Following the Court of Appeal's declaration, the deceased filed an originating summons to set aside the consent order. On 31 March 2017, Azimah Omar J (as she then was) set aside the consent order and ordered that the land reference be reheard before a different High Court judge on the basis that the category of land use of the scheduled lands is "building". The Court of Appeal on 25 September 2017 upheld Azimah Omar J's decision and ordered that this land reference proceeding be remitted for rehearing at the High Court.

[11] This land reference was reheard before Vazeer Alam bin Mydin Meera J (as he then was) and two assessors. On 3 May 2018, His Lordship delivered his decision. He ordered, *inter alia*, additional compensation in the sum of RM1,426,266.18 be paid to the applicant ("Vazeer Alam J's decision").

[12] Dissatisfied with Vazeer Alam J's decision, the applicant appealed against the decision. On 20 March 2019, the Court of Appeal allowed the applicant's appeal against Vazeer Alam J's decision and remitted the land reference to the Shah Alam High Court for rehearing before a different judge.

[13] This land reference was reheard for the second time before Che Mohd Ruzima Ghazali J (as he then was) and two assessors. On 20 November 2019, Che Mohd Ruzima Ghazali J delivered his decision as to the compensation to be paid to the applicant (the principal amount, which included the market value and injurious affection) ("Che Mohd Ruzima J's decision"). His Lordship delivered his decision as to the late payment charges and costs to 20 January 2020.

[14] Dissatisfied with Che Mohd Ruzima J's decision on the principal amount, the applicants appealed against the said decision. On 26 January 2021, the Court of Appeal allowed the appeal against Che Mohd Ruzima J's decision and directed that this land reference be reheard before a different judge on the issues of market value, injurious affection, damages and rectification costs.

This Rehearing Of The Land Reference Proceeding

[15] This land reference proceeding has been before this court since 1995. Three rehearings has been ordered by the Court of Appeal. In the latest order, the Court of Appeal ordered that this land reference be heard before a different judge on the issues of market value, injurious affection, damages and rectification costs.

[16] After the Court of Appeal's latest order and prior to this third rehearing of the land reference proceeding, the applicant made applications to file a new valuer's report and rebuttal report, and to substitute the applicants as parties to this land reference proceedings. I allowed both applications on 17 February 2022 and 5 January 2023 respectively. The applicants subsequently filed the application for the QOLs to be determined by this court, which application is the subject matter of this judgment.

[17] This land reference has been before this court for almost 30 years and in those years many applications and appeals have been filed and orders made both by this court and the Court of Appeal, including the three applications before me mentioned above. Notwithstanding the length of time and the number of applications and hearings, it is important to remember that this is a land reference proceeding and my function as the High Court judge presiding over this land reference remains the same as the many judges of this court who had presided over this land reference since 1995.

[18] What is a land reference proceeding? And what is the function of the court in such proceeding? One of the clearest explanations to both these questions can be found in the judgment of Choo Kah Seng J (as he then was) in *KCSB Konsortium Sdn Bhd v. Pentadbir Tanah Johor Bahru & Anor* [2019] CLJU 790; [2019] 1 LNS 790, where he said:

> [17] A land reference proceeding is not like an action in court where a party is pursuing a right in law to seek for appropriate remedies against the wrongdoer who has committed a wrong against him. In a land reference proceeding, the court's role is merely to determine whether the award awarded by a Land Administrator is or is not a fair market value of compensation for the land acquired. A land reference proceeding is not an action *in personam* for a judgment against a person, or to enforce a right *per se*. *The court in a land reference proceeding merely determines whether the compensation award which was decided by a Land Administrator has over compensated or insufficiently compensated an owner of the property affected by the acquisition.* (emphasis added)

[19] The compensation for loss of property resulting from a compulsory acquisition is "adequate compensation". The function of the land reference court is to determine whether the Land Administrator had adequately compensated a person for the loss of land or building by reason of a compulsory acquisition.

[20] The Federal Court in its recent judgment in *MMC Tepat Teknik Sdn Bhd v. Pentadbir Tanah Daerah Klang & Anor And Other Appeals* [2023] 9 CLJ 1; [2023] 5 MLJ 520; [2023] 6 AMR 575 ("*MMC Tepat Teknik*") reiterated that "art. 13(2) of the Federal Constitution talks about adequate compensation and not just any compensation or even full compensation." Article 13(2) of the Federal Constitution reads:

> 13. Rights to Property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[21] What is "adequate compensation"? David Wong JCA (as he then was) *Jais Chee & Ors v. Superintendent of Lands & Surveys, Kuching Division, Kuching* [2014] 3 CLJ 467; [2014] 6 MLJ 439; [2018] 9 BLR 195, CA opined "the word "adequate" in art. 13(2) of the Federal Constitution can only mean what is fair and reasonable compensation". The Federal Court agreed with His Lordship's view in *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v. Ratnawati Hasbi Mohamad Suleiman* [2020] 2 CLJ 425; [2020] 2 MLJ 553, and in *MMC Tepat Teknik. In Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, the Federal Court said:

A Adequate Compensation

[197] Article 13(2) is a constitutional safeguard to landowners to receive "adequate compensation" upon acquisition. Even as the Act authorises the State to acquire land from landowners, the law provides that the person deprived of his property must be adequately compensated.

B [198] But what is adequate compensation for a person who has been deprived of his or her property? The term "adequate compensation" is not defined in the Act. In *Pentadbir Tanah Daerah Gombak v. Huat Heng (Lim Low & Sons) Sdn Bhd* [1991] 1 CLJ 16; [1991] 1 CLJ (Rep) 356; [1990] 3 MLJ 282, the Supreme Court held that "the basic principle governing compensation is that the sum awarded should, as far as practicable, place C the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired". (see "*Compulsory Acquisition and Compensation*" by Sir Frederick Corfield QC and RJA Carnwath).

[199] The above principle is known as the principle of equivalence. By this D principle, the affected landowners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land.

[22] The amount of compensation which is fair and reasonable is to be E determined based on the principles set out in the First Schedule to the LAA 1960, which includes among others, the category of use of the scheduled lands as of the date of the gazette notification.

[23] Hence, in this land reference proceeding, in order to arrive at an award of compensation that is adequate to compensate the applicants for their loss F of parts of the scheduled lands that were acquired, one of the factors that this court must determine is the category of land use of the scheduled lands as of 17 February 1994.

[24] On 15 February 2023, this present rehearing of the land reference proceedings commenced before me and two assessors. One of the issues G raised during the rehearing was whether the market value of the scheduled lands should be determined based on the category of land use of "building for commercial purposes". The applicants contend that the category of land use of the scheduled lands as of 17 February 1994 was "building commercial". Whereas, the respondent asserts that the category of land use H is "building" or "building for residential purposes".

[25] In order to determine the category of land use of the scheduled lands as of 17 February 1994 and whether they should be valued in this land reference proceedings as "building for commercial purposes", it is necessary for this court to ascertain what was the zoning under the Town and Country I Planning Act (Act 172) ("TPCA 1976") by the local planning authority in 1994 of the area in which the scheduled lands are located.

[26] For this purpose, this court adjourned this current rehearing of the land reference proceedings and on its own motion, wrote to Majlis Perbandaran Ampang Jaya ("MPAJ"), Jabatan Perancangan Bandar dan Desa ("JPBD") and Pejabat Daerah dan Tanah Gombak ("PDT Gombak") to enquire about the zoning of the scheduled lands as at the date of acquisition. It its letters dated 20 February 2023 to MPAJ, JPBD and PDT Gombak, the court asked the following questions:

(1) Adakah Jabatan Perancangan Bandar dan Desa ("JPBD") berkuasa untuk menentukan zoning bagi Lot 841, 843 & 847 GRN 10049, 10051 & 32548, Mukim Hulu Kelang, Daerah Gombak ("lot-lot yang terlibat") pada 17.02.1994?

(2) Adakah Majlis Perbandaran Ampang Jaya ("MPAJ") menggunapakai pelan guna tanah daripada JPBD pada tahun 1992?

(3) Apakah zoning guna tanah bagi setiap lot-lot yang terlibat pada 17.02.1994?

[27] MPAJ replied to the questions in its letter dated 27 February 2023, JPBD replied to the questions in its letter dated 8 March 2023, and PDT Gombak replied to the questions in its email to this court dated 10 March 2023. The letters from MPAJ and JPBD and the email from PDT Gombak were forwarded to the counsel for the applicants and the ALA. The answers in the said letters and email are reproduced below.

(i) email reply dated 10 March 2023 from PDT Gombak;

From: Mohd Shahril Bin Yaakob shahril.yaakob@selangor.gov.my
Sent: 10 March 2023 18:47
To: Siti Hazwani Hanim Binti Ramli
Subject: RE: MAHKAMAH TINGGI SHAH ALAM RUJUKAN TANAH NO: RS-15-85-1995

Puan,
Merujuk kepada perkara yang dibangkitkan dan emel pihak puan adalah dirujuk.

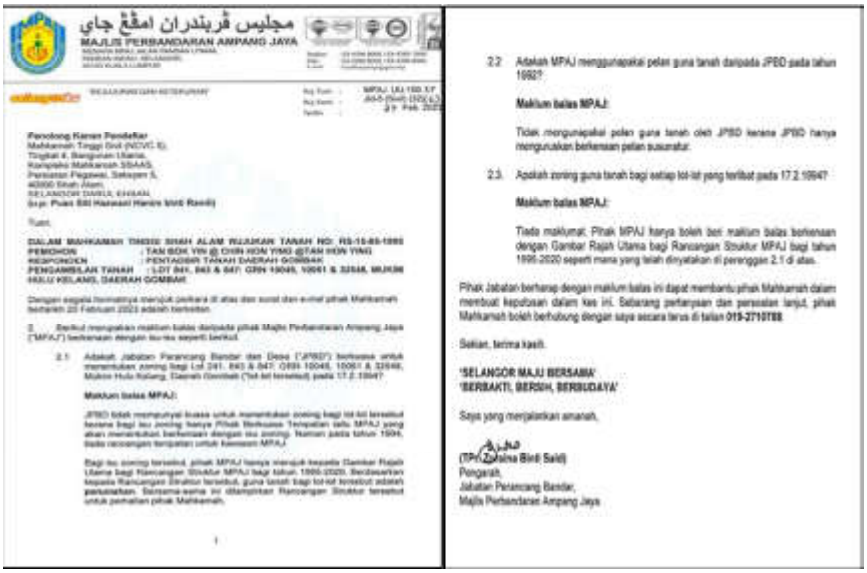
1. Status kegunaan tanah Lot 841, 843 & 847: GRN 10049, 10051 & 32548, Mukim Hulu Kelang, Daerah Gombak pada 17.4.1994 adalah NIL dan jenis tanah adalah Tanah Desa.
2. Cukai tanah adalah ditentukan merujuk kepada Seksyen 53 Kanun Tanah Negara.
3. Asas penetapan cukai tanah bagi lot-lot yang disebut di atas adalah berdasarkan jenis kegunaan tanah dan syarat nyata yang telah dinyatakan di dalam Hakmilik pada ketika itu.
4. Cukai tanah yang dikenakan (bagi tujuan pertanian) adalah berdasarkan pada Hakmilik yang dikeluarkan serta kegunaan tanah pada ketika itu.

Pentadbiran ini memohon maaf atas kelewatan mengemukakan maklumbalas.

Sekian, terima kasih.

MOHD SHAHRIL BIN YAAKOB
Penolong Pegawai Daerah (Pembangunan Tanah)
Bahagian Pengurusan Tanah
Pejabat Daerah dan Tanah Gombak
Tel : 03-6126 1555
Faks : 03-6137 9296

(ii) reply for MPAJ dated 27 February 2023; and



MAJLIS PERBANDARAN AMPANG JAYA

Penolong Kanan Pendaftar
Mahkamah Tinggi Sivil (NCVC 6),
Tingkat 4, Bangunan Utama,
Kompleks Mahkamah SSAAS,
Persiaran Pegawai, Seksyen 5,
40000 Shah Alam,
SELANGOR DARUL EHSAN.
(u.p.: Puan Siti Hasnani Hanim binti Ramli)

Tuan,

DALAM MAHKAMAH TINGGI SIVIL ALAM RUJUKAN TANAH NO: RS-15-85-1995
PEMOHON : TAN BOK YIN @ CHIN HON YING @TAN HON YING
RESPONDEN : PENTADBIR TANAH DAERAH GOMBAK
PENGAMBILAN TANAH : LOT 841, 843 & 847; GRN 10049, 10051 & 32548, MUKIM HULU KELANG, DAERAH GOMBAK

Dengan segala hormatnya merujuk perkara di atas dan surat dan e-mel pihak Mahkamah bertarikh 23 Februari 2023 adalah bertarikh.

2. Berikut merupakan maklum balas daripada pihak Majlis Perbandaran Ampang Jaya ("MPAJ") berkenaan dengan isu-isu seperti berikut:

2.1 Adakah Jabatan Perancang Bandar dan Desa ("JPBD") berkuasa untuk menentukan zoning bagi Lot 241, 843 & 847; GRN 10049, 10051 & 32548, Mukim Hulu Kelang, Daerah Gombak ("tot-lot berselut) pada 17.2.1994?

Maklum balas MPAJ:

JPBD tidak mempunyai kuasa untuk menentukan zoning bagi tot-lot tersebut kerana bagi isu zoning hanya Pihak Berkuasa Tempatan iaitu MPAJ yang akan menentukan berdasarkan zoning. Namun pada tahun 1994, tiada rancangan tempatan untuk kawasan MPAJ.

Bagi isu zoning tersebut, pihak MPAJ hanya merujuk kepada Gambar Rajah Utama bagi Rancangan Struktur MPAJ bagi tahun 1995-2020. Berdasarkan kepada Rancangan Struktur tersebut, guna tanah bagi tot-lot tersebut adalah perladangan. Semasa-mana ini dikemukan Rancangan Struktur tersebut untuk perhatian pihak Mahkamah.

2.2 Adakah MPAJ menggunapakai pelan guna tanah daripada JPBD pada tahun 1992?

Maklum balas MPAJ:

Tidak menggunapakai pelan guna tanah oleh JPBD kerana JPBD hanya menguruskan berkenaan pelan susunatur.

2.3. Apakah zoning guna tanah bagi setiap lot-lot yang terlibat pada 17.2.1994?

Maklum balas MPAJ:

Tiada maklumat. Pihak MPAJ hanya boleh beri maklum balas berkenaan dengan Gambar Rajah Utama bagi Rancangan Struktur MPAJ bagi tahun 1995-2020 seperti mana yang telah dinyatakan di perenggan 2.1 di atas.

Pihak Jabatan berharap dengan maklum balas ini dapat membantu pihak Mahkamah dalam membuat keputusan dalam kes ini. Sebarang pertanyaan dan penyelasan lanjut, pihak Mahkamah boleh berhubung dengan saya secara terus di talian 019-2710788.

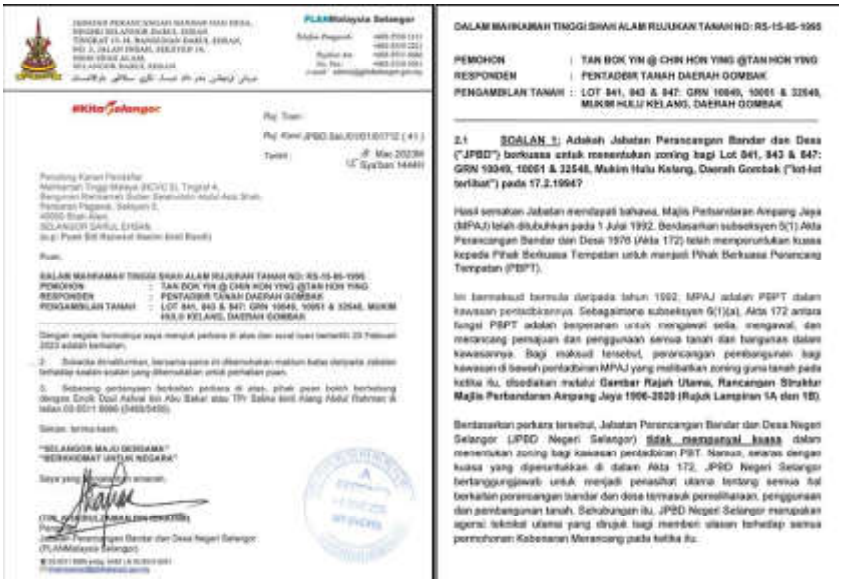
Sekian, terima kasih.

'SELANGOR MAJU BERSAMA'
'BERBAKTI, BERSIH, BERBUDAYA'

Saya yang menjalankan amanah,

(TPr Zalaina Binti Said)
Pengarah,
Jabatan Perancang Bandar,
Majlis Perbandaran Ampang Jaya

(iii) letter from JPBD dated 8 March 2023.



PLANMalaysia Selangor

#KitaSelangor

Penolong Kanan Pendaftar
Mahkamah Tinggi Malaya (NCVC 6), Tingkat 4,
Bangunan Perkhidmatan Sultan Sallahuddin Abdul Aziz Shah,
Persiaran Pegawai, Seksyen 5,
40000 Shah Alam,
SELANGOR DARUL EHSAN.
(u.p.: Puan Siti Hasnani Hanim binti Ramli)

Tuan,

DALAM MAHKAMAH TINGGI SIVIL ALAM RUJUKAN TANAH NO: RS-15-85-1995
PEMOHON : TAN BOK YIN @ CHIN HON YING @TAN HON YING
RESPONDEN : PENTADBIR TANAH DAERAH GOMBAK
PENGAMBILAN TANAH : LOT 841, 843 & 847; GRN 10049, 10051 & 32548, MUKIM HULU KELANG, DAERAH GOMBAK

Dengan segala hormatnya saya merujuk perkara di atas dan surat tuan bertarikh 23 Februari 2023 adalah berkaitan.

2. Sukacita dimaklumkan, bersama-sama ini dikemukakan maklum balas daripada Jabatan terhadap soalan-soalan yang dikemukakan untuk perhatian pihak tuan.

3. Sebarang pertanyaan berkaitan perkara di atas, pihak tuan boleh berhubung dengan Encik Dzul Ashraf bin Abu Bakar atau Pn Zalina binti Haji Abdul Rahman di talian 03-5511 8080 (5468/5455).

Sekian, terima kasih.

"SELANGOR MAJU BERSAMA"
"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(TPr. ZALAINA BINTI HAJI ABDUL RAHMAN)
Pengarah
Jabatan Perancang Bandar dan Desa Negeri Selangor
(PLANMalaysia Selangor)

DALAM MAHKAMAH TINGGI SIVIL ALAM RUJUKAN TANAH NO: RS-15-85-1995

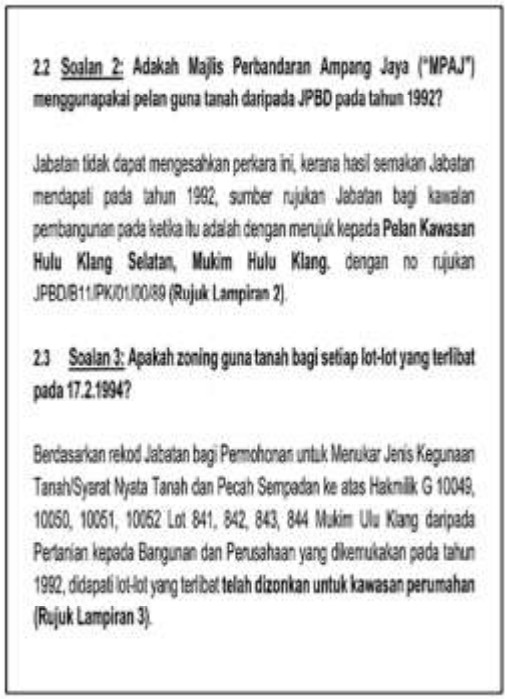
PEMOHON : TAN BOK YIN @ CHIN HON YING @TAN HON YING
RESPONDEN : PENTADBIR TANAH DAERAH GOMBAK
PENGAMBILAN TANAH : LOT 841, 843 & 847; GRN 10049, 10051 & 32548, MUKIM HULU KELANG, DAERAH GOMBAK

2.1 **SOALAN 1: Adakah Jabatan Perancangan Bandar dan Desa ("JPBD") berkuasa untuk menentukan zoning bagi Lot 841, 843 & 847; GRN 10049, 10051 & 32548, Mukim Hulu Kelang, Daerah Gombak ("lot-lot terlibat") pada 17.2.1994?**

Hasil semakan Jabatan mendapati bahawa, Majlis Perbandaran Ampang Jaya (MPAJ) telah diluluskan pada 1 Julai 1992. Berdasarkan subseksyen 5(1) Akta Perancangan Bandar dan Desa 1976 (Akta 172) telah memperuntukkan kuasa kepada Pihak Berkuasa Tempatan untuk menjadi Pihak Berkuasa Perancang Tempatan (PBPT).

Ini bermaksud bermula daripada tahun 1992, MPAJ adalah PBPT dalam kawasan pentadbirannya. Sebagaimana subseksyen 6(1)(a), Akta 172 antara fungsi PBPT adalah berperanan untuk mengawal selia, mengawal, dan merancang penajuan dan penggunaan semua tanah dan bangunan dalam kawasannya. Bagi maksud tersebut, perancangan pembangunan bagi kawasan di bawah pentadbiran MPAJ yang melibatkan zoning guna tanah pada ketika itu, disediakan melalui **Gambar Rajah Utama, Rancangan Struktur Majlis Perbandaran Ampang Jaya 1995-2020 (Rujuk Lampiran 1A dan 1B).**

Berdasarkan perkara tersebut, Jabatan Perancangan Bandar dan Desa Negeri Selangor (JPBD Negeri Selangor) **tidak mempunyai kuasa** dalam menentukan zoning bagi kawasan pentadbiran PBT. Namun, selaras dengan kuasa yang diperuntukkan di dalam Akta 172, JPBD Negeri Selangor bertanggungjawab untuk menjadi penasihat utama tentang semua hal berkaitan perancangan bandar dan desa termasuk pemeliharaan, penggunaan dan pembangunan tanah. Sehubungan itu, JPBD Negeri Selangor merupakan agensi teknikal utama yang dirujuk bagi memberi ulasan terhadap semua permohonan Kebenaran Merancang pada ketika itu.



2.2 Soalan 2: **Adakah Majlis Perbandaran Ampang Jaya ("MPAJ") menggunapakai pelan guna tanah daripada JPBD pada tahun 1992?**

Jabatan tidak dapat mengesahkan perkara ini, kerana hasil semakan Jabatan mendapati pada tahun 1992, sumber rujukan Jabatan bagi kawalan pembangunan pada ketika itu adalah dengan merujuk kepada **Pelan Kawasan Hulu Klang Selatan, Mukim Hulu Klang**, dengan no rujukan JPBD/B11/PK/01/00/89 **(Rujuk Lampiran 2)**.

2.3 Soalan 3: **Apakah zoning guna tanah bagi setiap lot-lot yang terlibat pada 17.2.1994?**

Berdasarkan rekod Jabatan bagi Permohonan untuk Merukar Jenis Kegunaan Tanah/Syarat Nyata Tanah dan Pecah Sempadan ke atas Hakmilik G 10049, 10050, 10051, 10052 Lot 841, 842, 843, 844 Mukim Ulu Klang daripada Pertanian kepada Bangunan dan Perusahaan yang dikemukakan pada tahun 1992, didapati lot-lot yang terlibat **telah dizonkan untuk kawasan perumahan (Rujuk Lampiran 3)**.

This Application For The Determination Of The QOLs

[28] On 29 March 2023, the applicant filed an application for the QOLs to be determined by this court. The QOLs are:

> Q1. Whether the principle of issue estoppel and/or *res judicata* applies to the earlier decisions of the High Court given on 20.11.2019 (in particular, the finding at paragraph 16 of the Grounds of Judgment dated 08.01.2020) and on 03.05.2018 (in particular, the finding at paragraph 11 of the Grounds of Judgment dated 02.10.2018) that the Scheduled Lands are zoned as commercial as at the date of valuation and ought to be valued as "commercial building" (bangunan perdagangan) instead of "residential building" (bangunan kediaman) and which finding was not specifically varied or reversed by the Court of Appeal?
>
> Q2: In the event this Honourable Court answers the question in paragraph 1 above in the negative, whether the Scheduled Lands ought to be valued on the basis that the Scheduled Lands were zoned as commercial based on the actual and existing land use of the Scheduled Lands as at the date of valuation of 17.02.1994?
>
> Q3: In the event this Honourable Court decides that the Scheduled Lands are to be valued as "commercial building" (bangunan perdagangan):

3.1 Whether lands that are subsequently used for the construction of a petrol station with similar characteristics as the Scheduled Lands which are situated within the vicinity of the Scheduled Lands can be used as comparable transactions to determine the market value of the Scheduled Lands pursuant to paragraph 1(1A) of the First Schedule of the Land Acquisition Act 1960?

3.2 Whether lands that are located in an adjacent district (mukim) with similar characteristics as the Scheduled Lands, which are situated within the vicinity of the Scheduled Lands, can be used as comparable transactions to determine the market value of the Scheduled Lands pursuant to paragraph 1(1A) of the First Schedule of the Land Acquisition Act 1960?

Q4: In the event this Honourable Court answers both the questions in paragraphs 1 and 2 above in the negative, whether the question of zoning is wholly irrelevant to the valuation of the market value of the Scheduled Lands as at the date of valuation of 17.02.1994?

Q5: Whether the Court assessors when determining their opinion on the amount of compensation to be given shall refer only to the documentary evidence that have been filed by the parties in the present proceedings for the purposes of this rehearing, and not other evidence relating to the Scheduled Lands in earlier Court proceedings or from other sources?

[29] Pursuant to s. 45(2) of the LAA 1960 and O. 33 r. 1 and r. 2 of the Rules of Court 2012 ("ROC"), this court has the power to adjudicate on any question or issue of law arising in this land reference proceeding, with or without the assistance of assessors.

[30] At the initial hearing of the applicants' QOLs application on 21 July 2023, this court allowed the applicants to reamend their QOL application and to proceed with the reamended application for the determination of the QOLs by a High Court Judge sitting alone under O. 33 r. 2 of the ROC.

[31] During the continued hearing of the QOLs application on 11 September 2023, the following witnesses were cross-examined by the applicant's counsel, Mr Raymond Mah, and the Selangor State Assistant Legal Advisor ("ALA), Tuan Khairul Nizam bin Abu Bakar:

(i) Tuan Sallehudin bin Samsuddin, Town Planning Officer from PLANMalaysia Selangor ("JPBD") (saksi sepina pemohon 1 ("SSP1));

(ii) Puan Zuraina binti Said, Director of the Department of Town Planning, Majlis Perbandaran Ampang Jaya ("MPAJ") (saksi sepina pemohon 2 ("SSP2));

(iii) Mr Tan Boon Chit, the third applicant (saksi sepina responden 1 ("SSR1")); and

(iv) Encik Azuan bin Abu Mansol, the applicants' private valuer (saksi sepina responden 2 ("SSR2")).

[32] Upon due and proper consideration of the documentary evidence filed by the parties for the third rehearing and this application, the testimonies of the subpoena witnesses, the submissions of counsel and the relevant laws, the court's answers to the QOLs are as follows:

	Court's Answer
Q1:	**Negative.** The principle of issue estoppel and/or *res judicata* does not apply to Vazeer Alam J's decision of 03.05.2018 and Che Mohd Ruzima J's decision of 20.11.2019 since the whole of the decisions had been set aside by the Court of Appeal.
Q2:	**Negative.** The scheduled lands ought not to be valued on the basis that the scheduled lands were zoned as commercial based on the actual and existing land use of the scheduled lands as of the date of valuation of 17.02.1994. This is because the applicants failed to prove on a balance of probabilities that the actual and existing use of the scheduled lands was building for commercial purposes ("building commercial") as of 17.02.1994.
Q3:	As this Court had answered Q2 in the negative, this Court is not required to answer the questions in Q3 (3.1) and (3.2).
Q4.	**Negative.** Pursuant to the Land Acquisition Act 1960, the National Land Code 1965 and the Town and Country Planning Act 1976, the question of zoning is relevant to the determination of the market value of the scheduled lands as at the date of the gazette notification of 17.02.1994.
Q5:	**Affirmative.** When determining their opinion on the amount of compensation for the lands acquired, the Court's assessors shall refer only to the documentary evidence that has been filed by the parties in this rehearing of the land reference proceeding and not the previous rehearings of the proceeding or other sources.

[33] This judgment details my analysis and the full reasons for the court's answers to the QOLs.

Q1. Whether the principle of issue estoppel and/or res judicata applies to the earlier decisions of the High Court given on 20 November 2019 (in particular, the finding at paragraph 16 of the Grounds of Judgment dated 8 January 2020) and on 3 May 2018 (in particular, the finding at para. 11 of the grounds of judgment dated

2 October 2018) that the Scheduled Lands are zoned as commercial as at the date of valuation and ought to be valued as "commercial building" (bangunan perdagangan) instead of "residential building" (bangunan kediaman) and which finding was not specifically varied or reversed by the Court of Appeal?

[34] Learned counsel for the applicants, Mr Raymond Mah, submits that the issue of zoning of the scheduled lands is *res judicata* as the High Court through Vazeer Alam J's decision of 3 May 2018 and Che Mohd Ruzima J's decision of 20 November 2019 had found that category of land use for the scheduled lands is "building commercial".

[35] Mr Mah says that although the applicant had filed appeals against both decisions of the court, the issue of the category of land use or zoning of the scheduled lands was not challenged and did not form a ground of appeal against the said decisions. The respondent also did not file any cross-appeals to challenge the High Court's finding of law on the issue of the scheduled lands' category of land use. He submits that the Court of Appeal had only overruled the High Court's finding of facts pertaining to "market value, injurious affection, damages and rectification costs" and not the High Court's finding of law that the category of land use for the scheduled lands is "building commercial" lands. Hence, the issue of the category of land use is *res judicata* and ought not to be relitigated in this instant hearing.

[36] Mr Mah argues that the High Court's findings in both decisions that the category of land use for the scheduled lands is "building commercial" lands was not overturned by the Court of Appeal in its judgments on 20 March 2019 or 26 January 2021, and thus *res judicata*. He submits:

> 33. that the principle of *res judicata* applies and the respondent is estopped "from now (and again) contending that the Scheduled Land are zoned as residential land".
>
> 34. The finding of law that the category of land use of the Scheduled Land is building commercial was not reversed or overturned by the Court of Appeal either on 20.03.2019 or 26.01.2021. Thus, the Respondents are bound to comply with the earlier decisions of the High Court given on 20.11.2019 and on 3.5.2019 (*sic*)[1] wherein the Court made a finding that the Scheduled Lands are zoned commercial as at the date of valuation and ought to be valued as "commercial building" instead of "residential building". Hence, this issue of zoning ought not be relitigated at the present rehearing.

[37] He cites the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; [1995] 3 AMR 2559, where he says that the Supreme Court had highlighted that the principle of *res judicata* does not apply to a cause of action but also to an issue that had been determined in previous judgments, and that parties are estopped from challenging the correctness of previous judgments in subsequent proceedings

to prevent contradictions of previous judgments. He also cites the case of *Government Of Malaysia v. Dato Chong Kok Lim* [1973] CLJU 35; [1973] 1 LNS 35; [1973] 2 MLJ 74. In that case, the defendant made an application (encl. 9) in June 1971 to strike out the plaintiff's claim for recovery of income tax on the grounds that the Government's statement of claim was frivolous vexatious and an abuse of the process of the court. The application was dismissed by Chang Min Tat J in December 1972. In April 1973, the defendant filed another application (encl. 33) to strike out the statement of claim but on a different ground: namely, that the Government was not entitled to maintain a claim for income tax and penalties for the years of assessment 1961 to 1967. Sharma J dismissed the defendant's application in encl. 33 on the grounds that he is estopped on the principle of *res judicata* from making the second application to strike out the statement of claim since his earlier application in encl. 9 had been litigated and decided by the court earlier.

[38] The law on issue estoppel and *res judicata* is long settled. Pursuant to the principle of *res judicata*, a question of fact or a question of law cannot be relitigated and adjudged by a court and the parties are estopped from relitigating the matter in a future suit or proceeding, where:

(i) the question of fact or question of law had previously been litigated and decided by the court; and

(ii) (a) no appeal had been taken to a higher court against the said decision of the court; or

(b) an appeal had been taken to a higher court and the appeal was dismissed; or

(c) no appeal lies against the decision of the court.

[39] The defendant in *Government Of Malaysia v. Dato Chong Kok Lim* (*supra*) did not appeal against the decision of Chang Min Tat J in *Tan Wei Ma & Ors v. Pentadbir Tanah Daerah Gombak* dismissing his application in encl. 9 to strike out the statement of claim. Thus, the judgment is final and conclusive; the defendant is estopped on the principle of *res judicata* from making his subsequent application to strike out the claim. Sharma J held:

> The defendant did not appeal against that decision and so far as Enclosure 9 is concerned the judgment of Mr. Justice Chang Min Tat, in my view, is final and conclusive at this stage of the proceedings.

[40] Sharma J, at p. 76 para. B-C of his judgment reported [1973] CLJU 35; [1973] 1 LNS 35; [1973] 2 MLJ 74, quoted with approval the following passage on the principle of *res judicata* from the judgment in the Indian case of *Satyadhyan Ghosel & Ors v. Sint Deorahin Dobi & Anor*. AIR 1960 SC 941:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res is judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. *When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. …*
>
> (emphasis added)

[41] In *Messrs K Sila Dass & Partners v. Tune insurance Malaysia Bhd & Anor* [2017] 10 CLJ 475; [2018] 8 MLJ 252, Mohd Nazlan Ghazali JC (as he then was) held that the effect of setting aside of the High Court's order by the Court of Appeal rendered the whole decision of the High Court as unenforceable and of no legal effect. His Lordship held:

> [79] … I reiterate that this is not because under s. 42(4) such determination by the High Court is not binding. Instead, this is by reason of the fact that in the instant case, **the High Court order** that the learned arbitrator thought he was compelled to accept in his reconsideration of the first award, **was no longer valid after it was set aside by the Court of Appeal,** before such reconsideration by the learned arbitrator.
>
> (emphasis added)

[42] In contrast to the defendant in *Government Of Malaysia v. Dato Chong Kok Lim*, the applicant in this land reference proceeding did appeal against both Vazeer Alam J's and Che Mohd Ruzima J's decisions. The applicant's memorandum of appeal against Vazeer Alam J's decision reads:

> The above-named Appellant, Tan Bok Yin @ Chin Hon Ying @ Tan Hon Ying, appeal to the Court of Appeal **against the whole of the decision** of the Honourable High Court Judge, Vazeer Alam bin Mydin given on 3 May 2018 on the following grounds: … (emphasis added)

And his memorandum of appeal against Che Mohd Ruzima J's decision reads:

> The above-named Appellant, Tan Bok Yin @ Chin Hon Ying @ Tan Hon Ying, appeal to the Court of Appeal **against the whole of the decision** of the Honourable High Court Judge, Che Mohd Ruzima bin Ghazali given on 20.11.2019 on the following grounds: … (emphasis added)

[43] The Court of Appeal had allowed both appeals: it had set aside Vazeer Alam J's decision and ordered the land reference be remitted for rehearing before a different judge at this court. It had also set aside Che Mohd Ruzima J's decision and ordered this land reference be remitted to the High Court of Shah Alam for rehearing on the issues of market value, injurious affection, damages and rectification costs.

[44] With respect to learned counsel for the applicants, his client, having appealed against the whole of the decisions of the High Court and the Court of Appeal had allowed the appeals, cannot now argue that the findings of the High Court as to the category of land use of the scheduled lands in both decisions remains binding on the parties. The Court of Appeal had set aside both decisions. Thus, the High Court's decisions are no more and are, accordingly, no longer binding. It follows, therefore, that the findings in both decisions as to the category of land use are also no more and no longer binding.

[45] Accordingly, by reason of the setting aside of the earlier decisions of the High Court by the Court of Appeal, I find the issue of the category of land use of the scheduled lands is not *res judicata*. The parties are, therefore, not estopped from relitigating the issue of the category of land use of the scheduled lands.

Answer To Q1

[46] For the reasons above, this court's answer to the question in Q1 is in the negative.

Q2. In the event this Honourable Court answers the question in para. 1 above in the negative, whether the Scheduled Lands ought to be valued on the basis that the Scheduled Lands were zoned as commercial based on the actual and existing land use of the Scheduled Lands as at the date of valuation of 17 February 1994?

[47] The applicants' case is that based on their actual and existing use as of 17 February 1994, the scheduled lands ought to be valued as "building commercial" *ie*, buildings constructed for commercial purposes.

[48] Under ss. 101 and 103 of the Evidence Act 1950, the burden of proof is on the applicants to prove on a balance of probabilities that the "actual and existing use" of the scheduled lands on 17 February 1994 was building for a commercial purpose. Sections 101 and 103 of the Evidence Act state:

> 101. Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> …
>
> 103. Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> …

[49] Pursuant to s. 18 of the Town and Country Planning Act 1976 (Act 172) ("TPCA"), the use of any land or building must conform with the local plan. "Local plan" is defined in s. 2 of the TPCA as:

> "local plan", in relation to an area, means the local plan for the area, and any alteration of the plan, for the time being having effect in the area by virtue of subsection 15(1); and, in relation to any land or building, means the local plan, as so defined, for the area in which the land or building is situated; and "draft local plan" shall be construed as the context requires.

[50] The Federal Court in *MMC Tepat Teknik* (*supra*) held that in determining the compensation for any acquired land, the court must consider not only the provisions of the LAA 1960 but also the NLC and the Town and Country Planning Act 1976 (Act 172) ("TPCA"). Mary Lim FCJ delivering the judgment of the Federal Court said:

> [57] Here, we turn our attention to the application of the Town and Country Planning Act 1976 (Act 172) and the interplay of this Act with the NLC and also Act 486. Act 172 was already in force at the material time. …
>
> [58] Act 172 was enacted to provide for proper control and regulation of town and country planning in this country. Section 18 of Act 172 is unequivocal as to the use of all land, that it must be in conformity with the local plan. Section 19 further prohibits the development of any land unless and until requisite planning permission has been first secured from the authority concerned.
>
> …

[51] The Federal Court in para. [59] of its judgment also discussed the requirement in s. 9A of the LAA 1960 for the Land Administrator to procure from the State Director of Town and Country Planning specific information on the land use of the lands acquired at the time when considering the amount of compensation.

[52] However, the requirement in s. 9A of the LAA 1960 does not apply in this case because it was included in the LAA 1960 by the Land Acquisition (Amendment) Act 1997 (Act A999), which came into force on 1 February 1998, *ie*, after the date of the acquisition of these scheduled lands and after the enquiry by the Land Administrator.

[53] In *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor* [2015] 7 CLJ 27; [2015] 5 MLJ 554; [2015] 4 AMR 483, the Court of Appeal held:

> [17] In so doing, the High Court failed to take into consideration that the NLC was enacted in 1965 while the TCPA was enacted in 1976. Parliament cannot be held to be ignorant of the NLC enacted in 1965. **On the contrary, Parliament being aware of the NLC it passed in 1965, the approach to interpretation must be:**

(a) Parliament intended that the TCPA be read consistent with the NLC; and if not possible

(b) the TCPA, as the later legislation prevails.

[18] The NLC provided in general terms for land use for agriculture, building, and industry. Conditions in individual titles are too cumbersome a means for the purpose of planning development. Before the NLC, a large number of land titles had been issued. There were other laws and bye-laws. It is to these thats. 108 was directed. Section 108 [of the NLC], however, cannot apply to laws passed subsequently by Parliament and regulations authorised thereunder.

[19] We, therefore, hold the submission that s. 108 [of the NLC] renders the TCPA and zoning thereunder inconsistent with land use under the NLC titles null and void holds no merit.

[20] The TCPA provided specifically for the proper control and regulation of town and country planning in Peninsular Malaysia and for purposes connected therewith or ancillary thereto. *While the NLC addresses land use in individual titles, the TCPA addresses planning by land use zones. By the time the TCPA was promulgated, large numbers of land titles had been issued, with condition of use as often as not that differs from the zoning. For planned development to succeed, obviously if the condition of use in the title is in conflict with the zoning, the condition is almost routinely amended to the use authorised by the zoning.*

(emphasis added)

Were The Scheduled Lands Located In An Area Zoned As Commercial As At The Date Of The Gazette Notification?

[54] MPAJ is the local planning authority for the area in which the scheduled lands are located. Both MPAJ in its letter of 27 February 2023 and JPBD in its letter of 8 March 2023 confirmed that MPAJ as the local planning authority is empowered to determine the zoning for the area where the scheduled lands are located. They also confirm that JPBD does not have the authority to determine zoning in the administration area of a local authority. Instead, JPBD acts as the main advisor in relation to town and country planning and is the main technical agency referred to for reviewing all applications for planning permissions.

[55] MPAJ confirmed that in 1994 there was no local plan for the area. In 1994, MPAJ did not publish and/or gazette any local plan, and it had not designated any zoning in the area where the scheduled lands are located or the lands in its vicinity. SSP2 testified that the first local plan was published by MPAJ on 26 May 2011.

[56] SSP2 testified that MPAJ has no records or information on the zoning of the scheduled lands in 1994. She said:

... kita tiada rekod atau pun tiada maklumat berkenaan penggunaan zoning pada tahun 1994 kerana rancangan struktur MPAJ ada disediakan pada tahun 1995.

[57] In addition, JPBD confirmed that it did not publish and/or gazette any structure plan of the scheduled lands in 1994.

[58] Both SSP1 and SSP2 confirmed that structure plans did not exist as of the date of the gazette notification. The only structure plan available, adduced by SSP1 and SSP2 during the hearing, was published in 1998, which is four years after the acquisition of the scheduled lands. SSP1 agreed that JPBD could not rely on the structure plan in order to determine the zoning of the scheduled lands in 1994.

[59] Accordingly, as no local plan was published and/or gazetted by MPAJ, there was no zoning of the area in which the scheduled lands were located as at the time of the acquisition in 1994. Therefore, the scheduled lands were not zoned as commercial at the time of the gazette notification.

Are The Scheduled Lands Deemed To Be "Building Land With Commercial Status"?

[60] The applicants' valuer, Sr Azuan bin Abu Mansol ("SSR2"), in his valuation report dated 15 April 2022, stated that the scheduled lands are deemed as "building land with commercial status" and should, accordingly, be valued as such. He stated:

> As at the date of gazette notification, the land is deemed as building land with commercial status and therefore, the basis of valuation to determine fair and reasonable compensation shall subject to commercial land supported with evidence of commercial land transactions.
>
> …
>
> It is EMPHASIZED that Schedule Lands are to be valued as FULL BUILDING LAND for COMMERCIAL PURPOSES instead of Development Land with Building-Commercial Potential as taken by the Government Valuer and Assessor in the earlier re-hearings even though the category of land use in the titles are stated as "NIL".

[61] I find that SSR2's statement is misleading and incorrect. The Court of Appeal in its order dated 19 January 2016 in *Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor* Civil Appeal Originating Summons No. B-01(A)-310-09-2015 (Shah Alam High Court OS No. 24-754-06-2014) ("OS 754") ordered, *inter alia*:

> (c) Perenggan 1 Saman Pemula Perayu-Perayu dibenarkan seperti dipohon, iaitu Mahkamah ini mengisythirakan bahawa Lot-Lot 841, 842, 843 dan 844, Mukim Hulu Kelang, Daerah Gombak, Negeri Selangor adalah kini dan sejak permulaan penguatkusaan Kanun Tanah Negara 1965 tanah-tanah di bawah kategori "bangunan".

[62] As is evident from the Court of Appeal's judgment in OS 754 (reported at *Tan Wei Mia & Ors v. Pentadbir Tanah Daerah Gombak & Anor* [2016] 7 CLJ 722; [2016] 5 MLJ 43) the applicants in OS 754 had sought for a declaration that Lots 841-844 "are and have been since the coming into force of the National Land Code, land subject to the category of "building". They did not seek for a declaration that the category of land use of Lots 841-844 is building for commercial purposes.

[63] The Court of Appeal allowed the declaration sought by applicants in OS 754: it held that it was not necessary for the applicants to seek from the state authority under s. 124 of the NLC for a variation of the category of land use from "nil" to "building". It made a declaration that category of land use of Lots 841-844 is "building": it did not make a declaration that category of land use of scheduled lands is "building for commercial status" as claimed by SSR2 in his valuation report.

[64] Furthermore, the declaration made by the Court of Appeal was only in respect of the category of land use for Lots 841 and 843. It did not make a declaration that the category of land use for Lot 847 is "building". Therefore, the category of land use for Lot 847 as of the date of the gazette notification remains as "nil".

[65] Accordingly, I find that the scheduled lands were not deemed as building land with commercial status or commercial purposes as at the date of the gazette notification.

Were The Scheduled Lands Used As Building For Commercial Purposes As Of 17 February 1994?

[66] Learned counsel for the applicants, Mr Raymond Mah, submitted that the scheduled lands ought to be valued based on their actual and existing use as of the date of the gazette notification, which he contends is "building commercial" for the following reasons:

(i) Lot 841 and Lot 843 were tenanted to two separate tenants (Seng Huat Trading Company and AsiaGroup Sdn Bhd) for commercial purposes (hardware materials & storage purposes);

(ii) approval was granted by Majlis Daerah Gombak in 1982 to build a temporary stockyard on Lot 841;

(iii) the deceased applied and paid for planning permission for "setor/kedai sementara" in 1990 for Lot 847; and

(iv) the respondent's valuer observed that there was Bangunan Pejabat, Pondok Pengawal and Pagar (dawai berangkai) on Lot 847 during site visit on 16 May 1994. This fact was accepted by the Land Administrator in 1995. He had awarded the deceased the sum of RM57,000,the sum

of RM2,500 and the sum of RM3,500 as compensation for the loss of the Bangunan Pejabat, Pondok Pengawal and Pagar (dawai berangkai) respectively.

[67] Below is my analysis of whether the applicants have proved on a balance of probabilities the actual and existing use of the scheduled lands as of 17 February 1994 were building for commercial purposes.

Lots 841 And 843

(i) Approval In 1982 To Build A Temporary Stockyard On Lot 841

[68] Mr Tan Boon Chit, the third applicant ("SSR1") averred in para. 7.3 of his affidavit dated 29 March 2023 in support of the QOLs ("AIS") that approval was granted to build a temporary stockyard on Lot 841 in 1982. A copy of a letter dated 19 July 1982 from the Majlis Daerah Gombak addressed to Kumpulan Senireka is exhibited on pp. 270 to 271 of the AIS.

[69] The copy of the letter shows that the Majlis Daerah Gombak had approved Kumpulan Senireka's application to build a temporary stockyard on Lot 841. The approval was subject to the conditions detailed in items A and B of the letter. The condition in item A (iii) is reproduced below:

> iii) *Kebenaran sementara sahaja kerja tersebut hanya untuk tempoh selama 2½ tahun sahaja dan pihak pemaju mestilah membersihkan kawasan stockyard kepada keadaan asal.* Kegagalan pihak pemaju mematuhi kehendak-kehendak Majlis Daerah Gombak baagi membolehkan wang cagaran digunakan untuk perbelaanjaan kerjaa-kerja pembersihan oleh Majlis Daerah Gombak. (emphasis added)

[70] The letter from Majlis Daerah Gombak shows that the approval granted in 1982 was for a temporary stockyard to be built on Lot 841 for a period of 2½ years only. It is a condition of the approval that at the expiry of the 2½ year period, the stockyard area on the land must be cleaned to its original condition.

[71] It follows therefore, the approval would have expired in early 1985 *ie*, 2 ½ years after the date of the approval. The applicants did not provide any evidence that the approval was extended after its expiry up until the acquisition of part of Lot 841 in 1994.

(ii) Approval In 1986 To Build A Temporary Store On Lot 841

[72] SSR1 in para. 7.2 of the AIS averred that Majlis Daerah Gombak had approved building a temporary store (setor/kedai sementara) on Lot 847. However, as the images of the documents show (reproduced in para. [92] below), the documents were in respect to the payment of wang cagaran (deposit) to build a setor sementara (temporary store) on Lot 841.

(iii) Was Lot 841 And 843 Tenanted For Commercial Purposes In 1994?

[73] SSR1 averred in para. 7.1 of the AIS that the applicant had rented Lots 841 and 843 (together with the adjacent lands – Lots 842 and 844) to two separate tenants ((Seng Huat Trading Company ("Seng Huat") and AsiaGroup Sdn Bhd ("AsiaGroup")) for commercial purposes (hardware materials and storage purposes). To support his averment, SSR1 stated that the documents exhibited on pp. 260 to 265 of exhibit "TBC1" is a tenancy renewal agreement dated 1 May 1994 between the deceased and AsiaGroup.

[74] However, the document exhibited at the exh. "TBC1", pp. 260 to 263 is the tenancy renewal agreement between the deceased and AsiaGroup ("AsiaGroup Tenancy Renewal Agreement"), and the document at pp. 264 to 265 is a tenancy renewal agreement between the deceased and Seng Huat ("Seng Huat Tenancy Renewal Agreement").

(i) paragraphs 1 to 3 of the AsiaGroup Tenancy Renewal Agreement on p. 260 of exh. "TBC1" are reproduced below:

> THIS TENANCY RENEWAL AGREEMENT is made this 1st day of May 1994 between TAN BOK YIN (NRIC NO 0510786) of No 10 Main Street Ampang, 68000 Selangor Darul Ehsan (hereinafter called "the Landlord") and ASIAGROUP SDN. BHD. C/O ANG AH HOCK (NRIC NO.0225358 (S)) of Lots 841-842 Jalan Hulu Kelang, Ampang, 68000 Selangor Darul Ehsan (hereinafter called "the Tenant") of the other part.
>
> WHEREAS by a TENANCY AGREEMENT made on 11th day of April 1991 (hereinafter called the "Said Tenancy Agreement"), between the Landlord and the Tenant's Predecessor to the Said Tenancy Agreement, Jia Heng Heavy Equipment (M) Sdn Bhd C/O Ang Ah Hock, on the other part, the Landlord agreed to let and the Tenant agreed to accept a Tenancy of a piece of Land known as Lot 841 Hulu Kelang, Ampang 68000 Selangor D.E. in the Said Tenancy subject to the rental, terms and conditions set out therein.
>
> AND WHEREAS BY MUTUAL CONSENT, the Landlord is desirous of let an expanded space up to 120 800 Sq. Feet comprise of part of Lots 841-842 as marked red and coloured in Plan A attached in the Preamble to the Tenancy Renewal Agreement (hereinafter called "the Said Land"), and the Tenant is desirous to take up the Said Land for a further term of Two (2) years subject to the rental, terms and conditions as set out herein.

(ii) paragraphs 1 to 3 of the Seng Huat Tenancy Renewal Agreement on p. 264 of exh. "TBC1" are reproduced below:

> THIS TENANCY RENEWAL AGREEMENT is made this 1st day of May 1994 between TAN BOK YIN (NRIC NO 0510786) of No 10 Main Street Ampang, 68000 Selangor Darul Ehsan (hereinafter called "the Landlord") and SENG HUAT TRADING

A COMPANY of Lot 841 Jalan Hulu Kelang, Ampang, 68000 Selangor Darul Ehsan (hereinafter called "the Tenant") of the other part.

WHEREAS by a TENANCY AGREEMENT made on 11th day of May 1992, which was a renewal of the original Tenancy
B Agreement dated 1st day of May 1990 (hereinafter called the "Said Tenancy Agreements"), between the Landlord and the Tenant on the other part, the Landlord agreed to let and the Tenant agreed to accept a Tenancy of a piece of Land known as Lot 841 Hulu Kelang, Ampang 68000 Selangor D.E. (hereinafter called the "Said Land") in the Said Tenancy subject to the rental, terms and
C conditions set out therein.

AND WHEREAS BY MUTUAL CONSENT, the Landlord is desirous of let and the Tenant is desirous to take up the Said Land for a further term of Two (2) years subject to the rental, terms and conditions as set out hereunder.

D **[75]** The excerpt of the AsiaGroup Tenancy Renewal Agreement and the Seng Huat Tenancy Renewal Agreement reproduced in para. [74] above shows that:

(i) there was a tenancy agreement dated 11 April 1991 between the deceased and the Jia Heng Heavy Equipment (M) Sdn Bhd ("Jia Heng"),
E who is the predecessor to AsiaGroup for the rental of Lot 841;

(ii) there was a renewal of the tenancy agreement between the deceased and AsiaGroup on 1 May 1994;

(iii) the renewed tenancy between the deceased and AsiaGroup is for the
F rental of parts of Lots 841 and 842 for an area of land of up to 120,800 sq. feet;

(iv) the renewed tenancy for part of Lots 841 and 842 between the deceased and AsiaGroup is for a period of two years from 1 April 1994;

G (v) there was a tenancy agreement dated 1 May 1990 between the deceased and Seng Huat for the rental of Lot 841;

(vi) there was a renewal of the tenancy agreement between the deceased and Seng Huat on 11 May 1992 for the rental of Lot 841; and

H (vii) the tenancy of Lot 841 between the deceased and Seng Huat was renewed again pursuant to the Seng Huat Tenancy Renewal Agreement for a period of two years from 1 May 1994.

[76] SSR1 did not adduce any other documents to show that the rental of parts of Lots 841 and 842 by AsiaGroup and the rental of Lot 841 by Seng
I Huat were extended beyond the two-year period provided in the AsiaGroup Tenancy Renewal Agreement and the Seng Huat Tenancy Renewal Agreement.

[77] Additionally, the purpose of renting parts of Lots 841 and 842 by AsiaGroup and of Lot 841 by Seng Huat was not stated in either the AsiaGroup Tenancy Renewal Agreement or the Seng Huat Tenancy Renewal Agreement.

[78] SSR1 agreed under cross-examination by the ALA that the aforementioned exhibits do not provide evidence that the actual and existing use of scheduled lands at the date of the acquisition was "building commercial". He agreed that nothing is indicated in the copy of the agreements the purpose of the tenancy. An excerpt of his testimony is reproduced below:

ALA:	I understand. We take it that you signed this agreement, this agreement belongs to you. I take it, with reservation. But as far as the content of the agreement concerns, nothing was indicated that this tenancy, what is this tenancy meant for?
SSR1:	True

[79] He also agreed that nothing in the AIS or the documents exhibited therein support his averment that the scheduled lands are building for commercial purposes. The excerpt of SSR1's testimony is reproduced below:

ALA:	Thus Mr. Tan, looking at your own affidavit and exhibit before this Court, in referring this Court to the question of law, I am putting to you that your affidavit or exhibit did not support your contention that the subject matter land is the building for commercial, am I correct to say that?
SSR1:	Yes.

[80] Pursuant to s. 17(1) and s. 18(1) of the Evidence Act 1950, the admission made by SSR1 amounts to an admission within s. 17 of the Act. Sections 17(1) and 18 of the Evidence Act reads:

> **17. Admission and confession defined**
>
> (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.
> …
>
> **18. Admission by party to proceeding, his agent or person interested**
>
> (1) *Statements made by a party to the proceeding* or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them *are admissions.*

A (2) Statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.

(3) Statements made by:

(a) persons who have any proprietary or pecuniary interest in the
B *subjectmatter of the proceeding, and who make the statement in their character of persons so interested;* or

(b) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

C *are admissions if they are made during the continuance of the interest of the persons making the statements.* (emphasis added)

[81] The word "proceeding" in s. 18(1) of the Evidence Act may be criminal or civil proceeding. In *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1 at p. 188, Augustine Paul J (as he then was) held:

D Section 18(1) provides statements made by a party to the proceedings are admissions. The word "proceeding" in section 18(1) may be civil or criminal (*Sarkar on Evidence* (15th Ed) Vol 1 page 372) …

[82] SSR1 is a party to this land reference proceeding; he is one of the applicants. He made the statement under cross-examination by the ALA
E during the hearing of this QOL application, and he has proprietary and/or pecuniary interest in the subject matter of this land reference proceeding *ie*, the amount of compensation payable to the applicants for the acquisition of the scheduled lands. Accordingly, the statement made by SSR1 during this hearing is an admission that his affidavit and the exhibits produced therein
F do not support the applicants' claim that Lots 841 and 843 were tenanted for commercial purposes in 1994.

[83] The documentary evidence exhibited by SSR1 in the AIS shows that (i) there was an approval in 1982 to build a temporary stockyard on Lot 841 for a period of 2 ½ years; and (ii) there was an approval in 1986 to build
G a temporary store on Lot 841. However, there is no evidence produced that the approvals for the temporary stockyard and the temporary store had been extended to February 1994.

[84] The AsiaGroup Tenancy Renewal Agreement and the Seng Huat Renewal Agreement show that Lot 841 was tenanted to Seng Huat and parts
H of Lots 841 and 842 were tenanted to AsiaGroup at the time of the acquisition in February 1994. However, the applicants did not prove that the tenancy was for commercial purposes, which fact was admitted by SSR1 during the hearing.

I

[85] In his valuation report, the applicants' valuer, SSR2, had stated that Lot 841 had been continuously tenanted for commercial usage and that it was expanded to include Lot 843. In para. 14.0 of his report, he stated:

> There is no doubt that Lot 841 was continuously tenanted for commercial usage which later expanded to include Lot 843.

[86] However, the applicants did not produce any document to show that Lot 843 was tenanted at the time of the acquisition. SSR1 did not produce any documents to show that Lot 843 was tenanted in 1994.

[87] Contrary to the applicants' own case, during re-examination by the applicants' counsel, SSR1 stated that the tenant occupied Lot 843 after 1994, *ie*, after the acquisition of the lands. The excerpt of SSR1's testimony is reproduced below:

Applicants' Counsel:	Can I ask you, if you say the tenant subsequently occupied 843, from what date did the tenant occupied 843?
SSR1:	It will be after 1994.

[88] Accordingly, on careful analysis of the evidence adduced by the applicants in SSR1's affidavit and SSR2's valuation report and the testimonies of the witnesses, this court finds that the applicants have failed to prove their claim that Lots 841 and 843 were tenanted for commercial purposes as of the date of the gazette notification. By the applicants' own evidence, Lot 843 was tenanted only after 1994.

Lot 847

[89] SSR1 averred in para. 7.2 of the AIS that the applicant had applied and paid for a kebenaran merancang for setor/kedai sementara in 1990 for Lot 847. In support of his averment, SSR1 referred to a copy of the document exhibited in Lampiran E of SSR2's valuation report; and a copy of an application that was approved by the Majlis Daerah Gombak on 5 August 1986 (exh."TBC1" pp. 267 to 268 of the AIS).

[90] The image of the document exhibited in Lampiran E of SSR2's valuation report is reproduced below. It shows bill dated 17 May 1990 for the payment of the sum of RM399 for "Cadangan: Membina sebuah setor/kedai sementara di atas Lot 847, Jalan Hulu Klang Daerah Gombak". The stamp on the top right-hand corner of the bill shows that the deposit was paid on 27 June 1990.

A

MAJLIS DAERAH GOMBAK

No 10064

BUTIR-BUTIR

BAYARAN

B

C

D

[91] The image of the documents on pp. 267 and 268 of exh. "TBC1" are reproduced below.

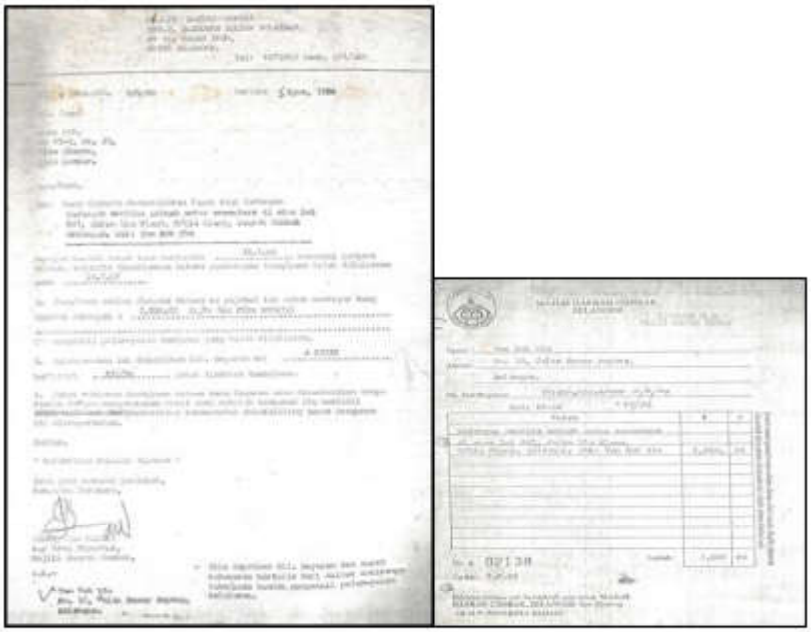
E

F

G

H

I



[92] Both images show that the documents are not approvals by Majlis Daerah Gombak for the construction of a temporary store (store sementara) on Lot 847 as averred by SSR1. The document on p. 267 is a copy of a letter from Majlis Daerah Gombak dated 5 August 1986 notifying the person to whom it is addressed (and copied to the deceased) that the application to build a setor sementara on Lot 841 has been approved and that the person is to come to the district council's office to pay the deposit of RM2,000. And the document on p. 268 is a copy of the payment receipt dated 5 August 1986 of the RM2,000 deposit for the proposal to build a temporary store (setor sementara) on Lot 841.

[93] The learned ALA disagrees that the documents in pp. 267 to 268 of exh. "TBC1" is a planning permission (kebenaran merancang) for setor/kedai sementara in 1990 for Lot 847 as averred by the applicants. He submits the copy of the documents on pp. 267 to 268 of the exh.t "TBC1", is actually a receipt for a deposit (wang cagaran) to build a temporary store/ shop on Lot 841. He submits that the approval for the setor/kedai sementara was on Lot 841 and not Lot 847 as contended by the applicants. Also, the approval was for a limited time only and it was in 1986 – long before the acquisition of the scheduled lands in 1994.

[94] From the images of the documents on pp. 267 and 268 of exh. "TBC1", it is clear that neither document is a planning permission (kebenaran merancang) to build a setor/kedai sementara on Lot 847. The documents are with respect to the payment of wang cagaran (deposit) to build a setor sementara (temporary store) on Lot 841.

[95] "Planning permission" is defined in s. 2 of the TPCA 1976 to mean "permission granted, with or without condition, to carry out development". And "development" is defined as:

> the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over or under land, the making of any material change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands; and "develop" shall be construed accordingly

[96] SSR2 had stated in p. 7 of his valuation report stated in respect of Lot 847, "The landowner applied and paid for planning permission for "setor/kedai sementara" in 1990, attached as Appendix E". But under cross-examination, SSR2 admitted that the document in Appendix E was an approval to build a setor/kedai sementara on Lot 841 and not a planning permission for "setor/kedai sementara" as he had stated in his valuation report.

[97] SSR1 too under cross-examination admitted that the copy of the letter from Majlis Daerah Gombak dated 5 August 1986 was not a kebenaran merancang but a receipt for the building of a temporary store on Lot 841.

[98] Based on a copy of the said document on pp. 267 to 268 of the exh. "TBC1", I find that the document is not a planning permission to construct a building on the Lot 847. It is an approval for the construction of a temporary store on Lot 841. To my mind, it would be a stretch of the natural and ordinary meaning of the words on the document on pp. 267 to 268 of the exh. "TBC1", to state it is a planning permission for development on Lot 847, when the subject matter of the document is:

> Wang Cagaran Membersihkan Tapak Bagi Cadangan membina sebuah setor sementara di atas lot 841, Jalan Ulu Klang, Hulu Klang, Daerah Gombak, Selor.
>
> Utk: Tan Bok Yin

[99] SSR1 in para. 7.4 of the AIS stated that the respondent valuer had observed that there was commercial development on Lot 847. In para. 7.4 of his AIS, he referred to p. 13 of the respondent's valuation report dated 18 April 2022. However, during the hearing he said that the correct reference should be para. 8.2 on p. 4 of the respondent's valuation report. Para. 8.2 of the report reads:

> 8.2 Struktur Binaan
>
> Semasa lawat periksa didapati terdapat struktur binaan di atas Lot 847 iaitu Bangunan Pejabat, Pondok Pengawal dan Pagar (dawai berangkai). Manakala bagai Lot 843 dan Lot 841, tiada terdapat struktur binaan diatasnya.

[100] SSR1, under cross-examination, agreed with the learned ALA's suggestion that the existence of the office building, guardhouse and chain link fence on Lot 841 does not by itself show that the category of land use of the said land is building for commercial purposes. The ALA's question and SSR1's reply is reproduced below:

ALA:	Ok. Mr Tan, my point. My question is the existence of bangunan pejabat, because you were referring to 8.2 just now, right, to show that there is existence of the building to convince the judge that this land is the building for commercial. Now, I'm putting to you, the existence of bangunan pejabat, the office, the pondok pengawal or the guardhouse or the pagar dawai berangkai does not by itself shows that the land is building for commercial. Itu sahaja. Agree or disagree? I'm suggesting to you these three things, bangunan pejabat, pondok pengawal and pagara does not by itself put the status of the land as land for, land building for commercial.
SSR1:	Alright. My answer, if you put it in isolation, yes.

[101] During re-examination, SSR1 stated the office building on Lot 847 was AsiaGroup or Jia Heng's office building. (Paragraph 2 of the AsiaGroup Tenancy Renewal Agreement reproduced in para. [74] above states that Jia Heng Hewavy Equipment (M) Sdn Bhd is the predecessor to AsiaGroup). He said the building was torn down when the land was acquired for the MRRII Project, which is why the Land Administrator awarded compensation in the sum of RM57,000 for the office building.

[102] SSR1's testimony that the office building on Lot 847 is AsiaGroup or Jia Heng's office is a bare averment unsupported by any documentary evidence. The applicants did not provide any evidence to show that Lot 847 was tenanted to AsiaGroup or Jia Heng at the time of acquisition.

[103] As for the two bungalows on Lot 847 (referred to by Mohd Hafiz bin Jamaludin @ Awang in an affidavit dated 7 March 2018 and in the report by Henry Butcher Real Estate Sdn Bhd ("Henry Butcher") dated 28 December 2010 attached to as Appendix "H" in SSR2's valuation report), SSR2 agreed that Henry Butcher's report was made in December 2010 – 16 years after the acquisition of Lot 847 and that it cannot be confirmed whether the two bungalows had been erected on Lot 847 as at the date of the gazette notification.

[104] SSR2 also stated that the existence of Taman Hulu Kelang Height is evidence of land use for "building commercial". Nonetheless, under cross-examination he agreed that Taman Hulu Kelang Height could also be evidence of land use for "building residential".

[105] As for MPAJ's Pelan Gunatanah shown in exh. "M" of SSR2's valuation report, SSR2 agreed that the Pelan Gunatanah was never gazetted and there was no zoning of the areas shown on the plan. The plan does not show the scheduled lands were zoned as "building commercial" as at the date of the gazette notification.

[106] SSR2 in his valuation report had stated that the scheduled land is deemed as building land with commercial status. However, he agreed under cross-examination that as at the date of the gazette notification there was no evidence that the category of land use of the scheduled lands was building for commercial status.

Highest And Best Use

[107] One of the valuation concepts referred to by SSR2 during the hearing of this application is "highest and best use". He said from a valuer's viewpoint, the valuer will refer to the "highest and best use" to determine the value of land: a valuer will look at the exposure to the commercial value of the land.

A Dari pandangan penilai, kita akan merujuk kepada highest and best use. Bila kita nak menentukan suatu penilaian, kita akan merujuk kepada highest and best use, di mana setiap pembeli, apabila dia nak membeli sesuatu tanah, dia akan melihat kegunaan tertinggi dan terbaik tanah tersebut …

B **[108]** Nonetheless, SSR2 agreed that exposure to commercial value is subject to the condition of land use (syarat penggunaan tanah), local plan (rancangan tempatan), and structure plan (rancangan struktur). Also, any views relating to exposure to commercial value, do not deny the fact that during the acquisition of the scheduled lands there was no evidence to show
C that the lands were used as building for commercial purposes. The excerpt of his testimony is reproduced below:

ALA:	Ok. Jadi, saya katakan pada En Azuan, apa-apa pandangan berkaitan dengan exposure commericla value yang En Zauan cakap, ia tidak menafikan bahawa pada masa pengambilan tanah tidak ada apa-apa evidence untuk menunjukkan tanah tersebut ialah tanah building for commercial?
SSR2:	Betul

D

E **[109]** The Malaysian Valuation Standards ("MVS") are standards prescribed by the Board of Valuers, Appraisers, Estate Agents and Property Managers Act ("the Board") under s. 10(hd) of the Valuers Appraisers, Estate Agents and Property Managers Act 1981 (Act 242) ("VAEAPM Act") to carry out the provisions of Part III to Part VIII of the Act. The MVS are not rules made under VAEAPM Act and are accordingly not a subsidiary legislation.

F **[110]** "Highest and Best Use" is not one of the standards prescribed in the MVS, which are MVS1 to MVS 19. Instead, it is one of the general valuation concepts and principles that "provides an overview of fundamentals that are particularly important to the understanding and application of the MVS". The section of MVS 6th Ed (2019) relating to "highest and best use" is
G reproduced below:

MALAYSIAN VALUATION STANDARDS
GENERAL VALUATION CONCEPTS AND PRINCIPLE

…

H E. HIGHEST AND BEST USE

(a) Highest and Best Use is a Premise of Value which assumes that the asset is put to a use that maximises its potential in continuation of its existing use or for some other alternative use assuming that the use is physically possible, legally permissible and financially feasible. This is
I determined by what a typical market participant would have in mind for the asset when formulating the price that it would be willing to bid at.

(b) The Highest and Best Use of an asset on a stand-alone basis may be different from the highest and best use as part of a group, where its contribution to the overall value of the group must be considered.

(c) The determination of the Highest and Best Use involves considerations of the following:

(i) Establishing whether the use is physically possible, having regard to what would be considered reasonable by market participants.

(ii) Reflecting as to whether the use is legally permissible, *and if there are any legal restrictions on the use of the asset eg, planning/zoning designations,* and considering the possibility that these may be subject to change.

(iii) Determining that the use is financially feasible by taking into account whether the use that is physically possible and legally permissible will generate sufficient return to a typical market participant, after taking into account the costs of conversion to that use, over and above the return on the existing use over the period to fully realise that use, and considering that market conditions are likely to be subject to change. (emphasis added)

[111] As the concept of "highest and best use" is not a rule made by the Minister under the VAEAPM Act or subsidiary legislation, the valuation concept of "highest and best use" is not binding on this court in determining the value of the scheduled lands as at the date of acquisition.

[112] The MVS expressly state that the determination of the "highest and best use" of any asset involves considering whether the use is legally permissible and whether "there are any legal restrictions on the use of the asset, *eg*, planning/zoning designations" and "the possibility that these may be subject to change".

[113] The purpose of the valuation of land in a compulsory acquisition is to determine the market value of the land at the date publication of the notification of the intended acquisition in the Gazette. The "highest and best use" of the land is subject to the category of land use, the express conditions on the title, the local plan and zoning of the area in which the lands are located.

[114] The evidence shows there was no zoning, no local plan or structure plan for the area where the scheduled lands are located at the time of the acquisition. And as SSP2 testified during the hearing, MPAJ did not have any record or information on the zoning of the area in 1994. Also, for the reasons discussed above, the applicants could not prove on a balance of probabilities that the actual and existing use of the scheduled lands as of the date of the gazette notification was building for commercial purposes. In brief, the applicants' evidence is:

(i) Lot 841: approval was given in 1982 to build a temporary stockyard for 2 ½ years; approval was given in 1986 to build a temporary store on the land; and the land was tenanted to AsiaGroup and Seng Huat as of the date of the gazette notification. They did not produce any evidence to show that the approval for the temporary stockyard was renewed after its expiry. There was also no evidence produced as to the purpose of the tenancy to AsiaGroup and Seng Huat;

(ii) Lot 843: no evidence was produced to show that there was any building on the land or that the land was used for a commercial purpose as of the date of gazette notification. SSR1's testimony is that Lot 843 was tenanted after 1994, *ie*, after part of the land was acquired; and

(iii) Lot 847: the Court of Appeal in OS 754 did not declare that the category of land use of Lot 847 was "building" before and since the commencement of the NLC, as they did for Lots 841 and 843 (see para. [64] above). Therefore, the category of land use of Lot 847 remains as "nil" as of the date of the gazette notification. The applicants did not produce any evidence to show the building that was on Lot 847 was used for commercial purposes as of the date of the gazette notification.

[115] Accordingly, for all these reasons, this court's answer to the questions in Q2 is in the negative. This court is of the opinion, based on the evidence before it, the scheduled lands ought not be valued as lands that were zoned as commercial based on the actual and existing use of the lands as of 17 February 1994.

Q3: In the event this Honourable Court decides that the Scheduled Lands are to be valued as "commercial building" (bangunan perdagangan),

3.1 Whether lands that are subsequently used for the construction of a petrol station with similar characteristics as the Scheduled Lands which are situated within the vicinity of the Scheduled Lands can be used as comparable transactions to determine the market value of the Scheduled Lands pursuant to para. 1(1A) of the First Schedule of the Land Acquisition Act 1960?

3.2 Whether lands that are located in an adjacent district (mukim) with similar characteristics as the Scheduled Lands which are situated within the vicinity of the Scheduled Lands can be used as comparable transactions to determine the market value of the Scheduled Lands pursuant to para. 1(1A) of the First Schedule of the Land Acquisition Act 1960?

[116] As this court had answered Q2 in the negative and did not find that the scheduled lands ought to be valued as "building commercial", this court is not required to answer the questions in Q3 paras. 3.1 and 3.2.

Q4: In the event this Honourable Court answers both the questions in paras. 1 and 2 above in the negative, whether the question of zoning is wholly irrelevant to the valuation of the market value of the Scheduled Lands as at the date of valuation of 17 February 1994?

[117] The court's answer to the question in this Q4 is in the negative. Based on the provisions in the LAA 1960, the NLC and the TCPA 1976 and the decisions of the Federal Court in *MMC Tepat Teknik* (*supra*) and the Court of Appeal in *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor* (*supra*), the question of zoning is relevant to the determination of the market value of the scheduled lands as at the date of acquisition of 17 February 1994.

Q5: Whether the court assessors when determining their opinion on the amount of compensation to be given shall refer only to the documentary evidence that have been filed by the parties in the present proceedings for the purposes of this rehearing, and not other evidence relating to the Scheduled Lands in earlier court proceedings or from other sources?

[118] The court's answer to the question in Q5 is in the affirmative. When determining their opinion on the amount of compensation for the lands acquired, the court's assessors shall refer only to the documentary evidence that has been filed by the parties in this rehearing of the land reference proceeding and not it the previous rehearings of the proceeding or other sources.

Endnotes:

1. Vazeer Alam J's decision was on 3 May 2018, and not on 3 May 2019 as stated in para. 34 of the applicant's written submissions.